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June 3, 2014

VIA E-MAIL

Molly Corbett Broad
President
American Council on Education
One Dupont Circle NW
Washington, DC 20036

Re: **Senator McCaskill's Request for ACE's Congressional
Investigation Training Materials**

Dear Ms. Broad:

We understand that Senator Claire McCaskill has requested that the American Council on Education ("ACE") produce to her the PowerPoint we used in connection with a "webinar" for ACE members entitled "Briefing on Congressional Investigations and the McCaskill Survey." The Senator has also requested to see a list of ACE members who participated in the briefing. You asked whether our firm authorizes ACE to produce the copyrighted Powerpoint to the Senator. We do.

The webinar was intended to familiarize participants, particularly your member institutions' in-house lawyers, with the congressional investigations process. It was based on numerous similar presentations that our firm has made over the years to clients, as well as to the public. For example, we have several times presented a similar Powerpoint presentation to participants in the Practicing Law Institute's webinars.

The Powerpoint used for the ACE webinar was widely disseminated to those members who participated in the webinar. They were not asked to treat the presentation as confidential. We therefore assumed that members could and likely would share the presentation with others. Neither ACE nor we designated the presentation as privileged. Accordingly, ACE is free to share it with the Senator.

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We note, however, that the Senator's request for the presentation is extremely unusual. Law firms like ours routinely conduct webinars concerning congressional investigations and other legal topics for clients and prospective clients, including trade associations. We are not aware of prior instances in which a congressional committee has demanded to see materials related to a training presentation about congressional investigations, and for very good reason. Congressional investigations are unusual, and many institutions have never been the target of one. In-house lawyers often are not familiar with the court cases, rules, and peculiar practices that govern them. Training webinars are an essential way for association members freely to exchange information about issues they face and to better understand when they need to seek legal advice.

Compelled disclosure of the attendance list for this webinar, in particular, presents very serious constitutional concerns. It would have the effect of identifying the subset of ACE members with a particular interest in the presentation's topic, even though those members rightfully understood that their participation in the webinar would be held in confidence by ACE. Trade associations and their members enjoy a right of free association under the First Amendment that protects their ability to communicate with one another without governmental interference. Under the circumstances presented here, compelled disclosure of the attendance list would directly undermine that First Amendment right.

The United States Supreme Court has long held that an organization's membership lists are protected from compelled government disclosure absent a "compelling" and "subordinating" government interest in their production. *See NAACP v. Alabama*, 357 U.S. 449, 466 (1958) ("We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment."). These protections also apply to an association's attendance lists. *See International Action Center v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002) (names of individuals who attended or planned to attend protests are "exactly the kind of information the First Amendment is designed to protect").

The constitutional safeguards against compelled disclosure of membership and attendance lists also apply in the context of congressional and other legislative investigations. Over a half century ago, the Supreme Court recognized that legislative investigations seeking to compel disclosure of membership lists have the potential to "substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights" and cannot be sustained without a "compelling and subordinating

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governmental interest essential to support direct inquiry” into the membership records. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 557 (1963); *see also Watkins v. United States*, 354 U.S. 178, 187 (1957) (Congressional investigations cannot abridge “the First Amendment freedoms of speech, press, religion, or political belief and association”).

Other courts have similarly emphasized that requests for membership and attendance lists in connection with governmental investigations may have a significant chilling effect on protected First Amendment associational activities. *See International Action Center*, 207 F.R.D. at 3 (emphasizing that disclosure of attendees would improperly “thrust [the individual attendees] into the harsh glare of the limelight”); *In re Grand Jury Proceeding*, 842 F.2d 1229, 1236 (11th Cir. 1988) (suggesting that because “government investigation itself may indicate the possibility of harassment,” a more “lenient” showing is required to establish an infringement of freedom of association when a government investigation “has already focused on a particular political group or groups”); *Local 491, International Broth. of Police Officers v. Gwinnett County*, 510 F. Supp. 2d 1271, 1296 (N.D. Ga. 2007) (prospect of “compelled questioning about [] organizational activities” creates a “chilling effect” on associational rights).

In this case, if Congress were to compel ACE to produce the attendance list, ACE’s members surely would be deterred from again associating with other members to educate themselves regarding this congressional investigation or, for that matter, any other topic. Such a result cannot be reconciled with the First Amendment right of free association.

As the Supreme Court explained in *Gibson*, protecting membership lists from compelled disclosure lies at “the very heart of the constitutional privilege to be secure in associations in legitimate organizations engaged in the exercise of First and Fourteenth Amendment rights.” Any departure from that standard would be inconsistent with “the maintenance of those essential conditions basic to the preservation of our democracy.” *Id.* at 557.

Please do not hesitate to let us know if you have any questions.

Sincerely,



Robert K. Kelner

American Council on Education

Briefing on Congressional Investigations and the McCaskill Survey

Robert K. Kelner

Holly Fechner

Brian D. Smith

May 5, 2014

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Overview

1. Background, Authority, and Context
2. Considerations for Survey Recipients
3. Issues on the Horizon
4. Practical Advice and Avoiding Common Mistakes

Background, Authority, and Context



Supreme Court:

- Congress can investigate anything within the “legitimate legislative sphere.”

Eastland v. United States Servicemen’s Fund, 421 U.S. 491 (1975).

Senate:

- “Each ... committee may make investigations into any matter within its jurisdiction.”

Senate Rule XXVI.

Background, Authority, and Context



Congressional investigations are unlike other legal process.

- Political motivations and considerations.
- “Wild West” without real rules.
- Safeguards are not available (e.g., attorney-client privilege(?), protective orders, right of appeal).
- Media leaks, press statements.

Background, Authority, and Context

Congress's motivation is a mix of substance and politics.

- Demonstrate to the public – in real time – that Congress is on the job protecting the American people.



The key role of politics.

- The audience is the American public.

Focus on the 55 schools identified by the Department of Education?

Background, Authority, and Context

Senator Claire McCaskill:

- Democratic Senator from Missouri.
- Elected to the Senate in 2006.
- Prosecutor; Missouri State Auditor.
- Chair of the Subcommittee on Financial and Contracting Oversight.



Background, Authority, and Context

Subcommittee on Financial and Contracting Oversight:

- Federal financial management; waste, fraud, and abuse; government contracts.

Other Senators on the Subcommittee:

- Carl Levin (D-MI)
- Mark Pryor (D-AR)
- Mary Landrieu (D-LA)
- Mark Begich (D-AK)
- Tammy Baldwin (D-WI)
- Ron Johnson (R-WI), Ranking Member
- John McCain (R-AZ)
- Mike Enzi (R-WY)
- Kelly Ayotte (R-NH)

Background, Authority, and Context

McCaskill press release:

- “The survey [will] gauge the effectiveness of federal oversight and enforcement under Title IX federal civil rights law and the Crime Awareness and Campus Security Act, commonly known as the Clery Act.”
- McCaskill’s recent efforts to address sexual assaults in the military.

Considerations for Survey Recipients

Surveys provide fodder for additional investigation.

- Survey of corporate tax practices, beginning in 2009.
- ~50 multinational corporations.
- Hearings: Microsoft and HP in 2012; Apple in 2013; Caterpillar in 2014.
- Subcommittee released aggregate data and redacted survey responses.

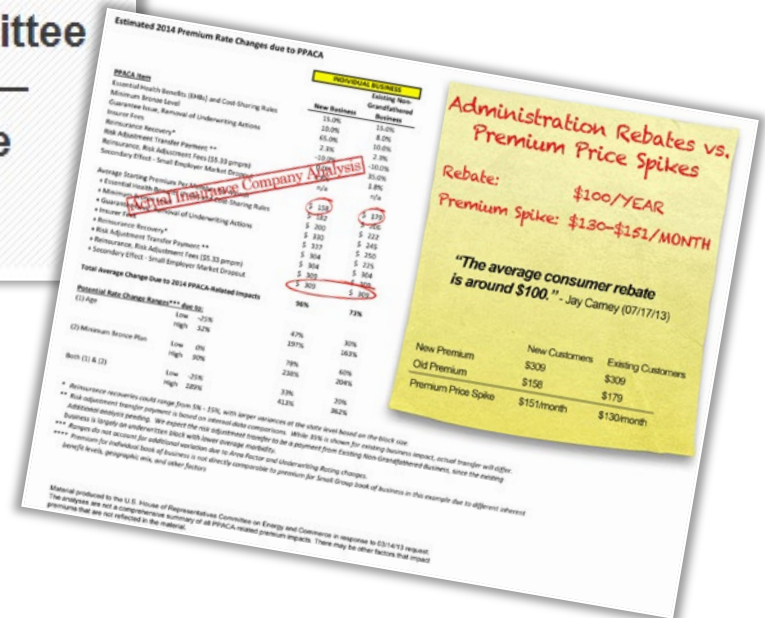


Considerations for Survey Recipients

Survey data used for political messages.

OBAMACARE RATE SHOCKER: Committee Surveys Leading Insurance Companies—Obamacare to Cause Premiums to Spike Nationwide, as High as 400 Percent

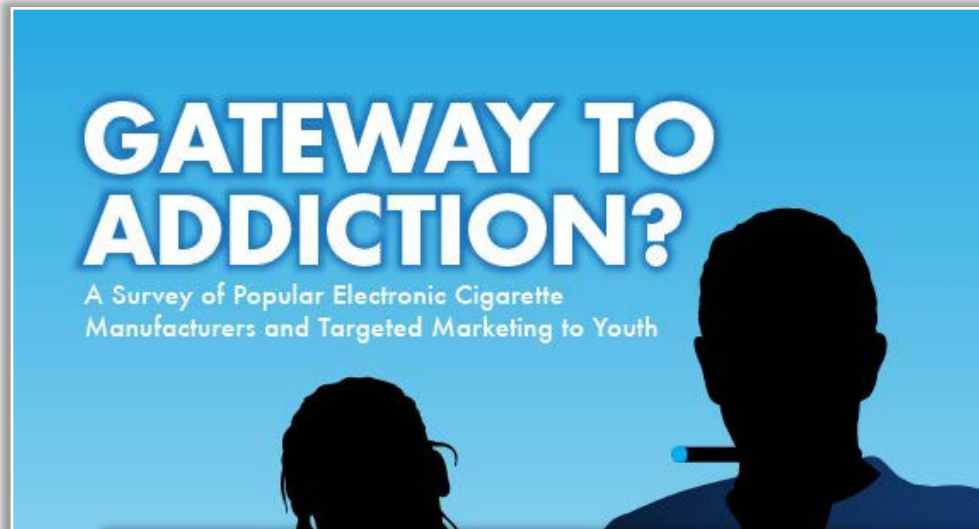
May 13, 2013



House Energy & Commerce Committee

Considerations for Survey Recipients

Survey used to spur regulatory action.



Recommendations

- 1) FDA should promptly issue deeming regulations asserting authority to regulate e-cigarettes. Responses from manufacturers indicate that overall the industry is supportive of some federal oversight.

Report by Democratic Members of Congress (Durbin, Waxman, Harkin, Rockefeller, Blumenthal, Markey, Brown, Reed, Boxer, Merkley, and Pallone).


Considerations for Survey Recipients

Requests from Congress – a split personality.

Survey of Campus Sexual Violence Policies and Procedures

United States Senate
Subcommittee on Financial and Contracting Oversight
Senator Claire McCaskill, Chairman

* Required



SECTION A: INVESTIGATIONS

A1. How many investigations of sexual violence has your institution conducted in the past 5 years? *

According to Title IX, an institution that knows or reasonably should have known about possible

Considerations for Survey Recipients

Requests from Congress – a split personality.

- Internally:
 - Take it seriously; treat it like a subpoena.
 - Gather relevant documents and information.
 - Understand all potentially responsive information.
 - Make sure your answers are bulletproof (caveat where needed).

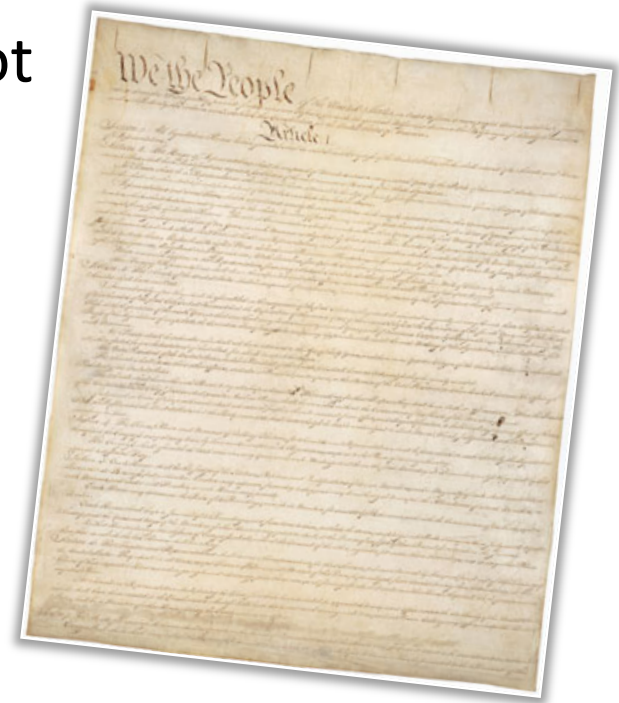
Considerations for Survey Recipients

Requests from Congress – a split personality.

- In your response to Congress:
 - Recognize that it is not a subpoena.
 - Opportunity for negotiations?
 - Opportunity to recast the questions?
 - Make sure your answers are bulletproof.
- Any information that you cannot provide?

Considerations for Survey Recipients

- Attorney-client privilege.
 - Congress maintains that it is not bound by common law (“court created”) privileges.
 - Constitutional privileges (e.g., 5th Amendment).
- Confidentiality?
 - Absolutely no guarantees.



Issues on the Horizon



An oversight hearing?

- Unlike testifying in any other setting.
 - Live media coverage.
 - Members dominate the dialog.
 - Very limited ability to rebut allegations.
 - Style can be as important as substance (especially when contrition is warranted).

Issues on the Horizon

- Prepare your materials.
 - Testimony – written and oral.
 - Potential Qs and As.
 - Focus on themes; not wordsmithing.
 - Know the facts. What will play well on TV?
- Prepare your witness.
 - Briefings on the Members and hearing logistics.
 - Oral testimony practice.
 - Many, many mock Q&A sessions.



Issues on the Horizon



Will Congress request documents from some schools?

- Discussions with staff.
 - Scope of requests and timeframe for production?
 - Electronic documents? Key custodians?
 - “Truckload” or get the staff what they need?
- Building a record of your negotiations with cover letters.

Issues on the Horizon

- Any advantage to a subpoena?
 - A subpoena doesn't even bring more process.
 - Chairman Carper can issue a subpoena by a vote of the Committee, or alone (if the Ranking Member does not object).
 - McCaskill's subcommittee can issue a subpoena.
- You cannot challenge a subpoena without first enduring congressional contempt.
- “Cooperative” subpoena for statutorily protected materials?

Practical Advice, Avoiding Mistakes

- Drawn from our real experiences, in many challenging scenarios for our clients.
- Common mistakes that we see in congressional investigations.



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Practical Advice, Avoiding Mistakes

Use the uniqueness to your advantage.

- Majority v. Minority.
- Fast pace.
 - Narrow, targeted searches can be completed more quickly.
- Media.
 - Congress will engage the media.
 - Use the media to learn Congress's intended direction.



Practical Advice, Avoiding Mistakes

Investigations bring collateral risks.

- Litigation or regulatory risks:
 - Documents or information released.
- Public relations risks:
 - Reputational harm.



Practical Advice, Avoiding Mistakes

Taking a “hard line.”

- Strategy:
 - Battle mode, litigation-like posture.
- Problem:
 - Congress focuses on the uncooperative.
 - Congress’s interest is unaddressed, thus heightened.
- Result:
 - Few can take the heat.
 - Cave in the end, after damage is done.



Practical Advice, Avoiding Mistakes

The early response overstated the case.

- **Strategy:**
 - Driven by PR objectives, an early response inadvertently overstates the case.
 - “We found the problem last month and fixed it.”
- **Problem:**
 - Early facts are incomplete.
 - Congress is much less forgiving than courts about newly discovered facts.
- **Result:**
 - Severe reputational damage as Congress alleges it was misled.

Practical Advice, Avoiding Mistakes

Not recognizing the legal risks.



- Strategy:
 - Treating the investigation as a political or PR event.
- Problem:
 - Congressional investigations bring real legal risks that require a legal response.
- Result:
 - The target inadvertently invites legal risks.

Practical Advice, Avoiding Mistakes

Lobbying your way out.

- Strategy:
 - Emphasis is on a political exit.
- Problem:
 - Government relations and lobbying strategies may not always be suited to a congressional investigation.
- Result:
 - Interest in the investigation may rise rather than fall.



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